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PROTECTING THE PUBLIC'S RIGHT TO KNOW: THE DEBATE OVER PRIVATIZATION AND ACCESS TO GOVERNMENT INFORMATION UNDER STATE LAW

CRAIG D. FEISER*

I. INTRODUCTION

> *The private corporation cannot be entrusted with the responsibility of maintaining and nurturing the rights of the individual. Part of the basis for the separation between the public and private enterprise is to protect the citizenry from the tyranny of both entities. When decision-making, planning and programming that were under the auspices of the public government are transferred to the control of a private corporation, the city residents lose whatever recourse they previously possessed to provide redress for their grievances.*[1]

In recent years, the rising cost of government has caused a debate over the advantages and disadvantages of privatizing government

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1. Shirley L. Mays, *Privatization of Municipal Services: A Contagion in the Body Politic*, 34 DUQ. L. REV. 41, 68 (1995).

services. While some call privatization a panacea of efficiency, others worry about potential public sacrifices.[2] Among these worries is the fear that unless access-to-information statutes can be extended to cover private entities, privatization will undermine the public's right to know.[3] This is because most state statutes providing for freedom of access to government documents do not explicitly grant access to documents that are in the hands of private entities.[4] Without legislative or judicial intervention interpreting these statutes broadly, most state governments could effectively transfer their documents into the hands of private companies and avoid the reach of freedom of information acts.[5]

In most states, courts have engaged in statutory interpretation that allows the access statutes to reach private entities, at least in some circumstances.[6] Courts have done this by interpreting the definitions of "agency" and "agency records" under their respective state statutes to encompass more than just records exclusively in the hands of traditional government entities.[7] To varying degrees, the courts of most states have allowed government access statutes to reach private entities that are entangled with or somehow connected to the government.[8] Whether any particular court grants access depends on the extent to which a private entity needs to be connected with the government in order to be considered a public entity.[9]

Although the subtle meanings of statutory terms are often difficult to interpret, the interpretation of these terms has a major impact on what information can be obtained by the press and the public, particularly in an age of continued governmental privatization.[10]

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2. *Compare id. with* Joseph F. Caponio & Janet Geffner, *Does Privatization Affect Access to Government Information?*, 5 GOV'T INFO. Q. 147 (1988) (stating that privatization of government functions can be an efficient management tool if used properly).

3. *See, e.g.*, Matthew Bunker & Charles Davis, *Privatized Government Functions and Freedom of Information: Public Accountability in an Age of Private Governance*, 75 JOURNALISM & MASS COMM. Q. 464, 464-68 (1998).

4. *See infra* Part III.

5. It should be noted that state access laws are given several different names, such as freedom of information laws, public disclosure laws, public access laws, and public records acts. This Article will refer to each state's act by its proper name when discussing that state.

6. *See infra* Part III.

7. *See infra* Part III.

8. *See, e.g.*, Robert Rivas & J. Allison DeFoor II, *When is a 'Private' Document a Public Record?*, FLA. B.J., Dec. 1993, at 52. (discussing Florida cases in which private entities were subject to the Florida Public Records Act because of their connections to government).

9. *See infra* Part III.

10. States like Texas, Florida, and Indiana have increasingly and aggressively pursued privatization initiatives in order to save taxpayers' money and to provide more efficient services. However, these initiatives have not always been widely successful. *See, e.g.*, Joan Thompson, *Texas Faces Problem with Private Prisons Inmates Sent from Other States Can Evade Law*, DALLAS MORNING NEWS, Nov. 6, 1996, at 19A (giving the example of two Oregon prisoners who were sent to a privately run prison in Texas and, after escaping, could not be punished under Texas or Oregon law for the escape); *Sunshine Law Is Going*

As the desire for efficiency leads to continued privatization,[11] it has been argued that the public will be increasingly shut out of operations that have traditionally been open to the public.[12] Some commentators say the courts must come forward and protect the public's right to know in the face of increasing private contracts for government services.[13] Because access laws in all fifty states are purely statutory, and most of these statutes do not explicitly reach private entities, it becomes a judicial matter to decide whether to hold private contractors performing government services accountable to the public.[14] In the absence of legislative amendment, courts are being forced to decide when access laws apply to these private entities performing government functions.[15] While some courts have provided clear guidance, others have made the standard less clear or failed to discuss the issue.[16]

The purpose of this Article is to analyze public access issues related to privatization and examine how state courts have dealt with requests for records from private entities performing government functions. These entities perform a wide range of services, from running prisons to operating dog-racing tracks.[17] The thirty-four states whose court systems have dealt with the issue of privatization have employed different approaches to decide when access-to-information statutes should apply to private entities.[18] Part II provides an overview of the scholarly debate over the pros and cons of privatization, as well as recent examples of the conflict between access laws and

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to the Dogs, Some Say Proposal Would Privatize Rabies Vaccination Records, FLA. TODAY, Mar. 19, 1996, at 6B [hereinafter FLA. TODAY] (discussing some of the proposed changes to Florida's Sunshine Law, including one that would close pet vaccination records from public access); UNIV. OF FLA., FLORIDA SUNSHINE SUMMIT 10 (1997) [hereinafter FLA. SUNSHINE SUMMIT] (comments of Kyle Neiderpreum, Freedom of Information Chair, Society of Professional Journalists, regarding unsuccessful privatization attempts in Indianapolis).

11. *See, e.g.*, Bill Theobald, *Public May Soon Get Access Boost; Online Computer Availability of City, County Records Might Be Increased When New Provider Firm Is Hired*, INDIANAPOLIS STAR, June 28, 1997, at B6; FLA. SUNSHINE SUMMIT, *supra* note 10, at 10 (comments of Jane Kirtley, Executive Director, Reporters Committee for Freedom of the Press, regarding increasing privatization of public hospitals).

12. *See* Bunker & Davis, *supra* note 3, at 5.

13. *See generally* Bunker & Davis, *supra* note 3.

14. *See infra* Part III.

15. *See id.*

16. *See id.*

17. *See* GARY W. BOWMAN ET. AL., PRIVATIZING CORRECTIONAL INSTITUTIONS 2 (1993); City of Dubuque v. Dubuque Racing Association, 420 N.W.2d 450, 451 (Iowa 1988).

18. The issue of the application of access laws to private entities has not yet reached the highest court level in many of these states. *See infra* Part III. The sixteen states that have not taken up the issue in the court system are Alabama, Alaska, Arizona, Hawaii, Idaho, Massachusetts, Mississippi, Nebraska, Nevada, New Mexico, Oklahoma, Rhode Island, South Dakota, Vermont, Virginia, and Wyoming. Some of the courts in these states have been presented with access cases involving private entities, but have provided no discussion on the reach of access statutes because the entity's private status was not the central issue of the litigation. These cases are not included in this Article's analysis.

privatization. Part II follows with an analysis of the various state court approaches. Part III then compares the different approaches. A categorization scheme for the approaches sheds light on which states provide for easier access to government information in the hands of private entities.

This Article is meant to be a guide for the media law practitioner, as well as the media professional, in determining which states are most likely to provide access to information in private hands and what types of entities are most likely to be subject to access laws. It explains that some states have more flexible standards than others for determining what falls within statutory definitions of "agency" and "agency records," tipping the balance in favor of access in most situations. This Article refers to these approaches as "flexible" because courts using these approaches consider more than one factor in deciding whether to grant access.[19] These flexible approaches can be compared to those of other state courts that only allow access to documents in private hands under more specific, restrictive circumstances. Usually, the more restrictive courts deny access because they are constrained to a greater extent by explicit statutory definitions of what constitutes an "agency" or an "agency record."[20]

This Article groups the approaches together to provide a useful categorization of the thirty-four states that explicitly handle the privatization issue. Although each state court system takes a slightly distinctive approach to the private entity issue, there are some similarities among different states' approaches. Additionally, there is no specific private entity that will always be subject to public access; it depends on the application of each state's test, some of which are more confined to explicit statutory definitions than others.

This Article does not suggest that there are categories of specific private entities (such as "all volunteer fire departments" or "all insurance departments") that will always be subject to access laws. Nevertheless, while it has been suggested that privatization has obvious benefits,[21] an informed discussion should include all of the possible impacts. This Article suggests that before leaping into privatization, both legal professionals and the public need to be aware of the impact privatization will have on their participation in the process of government.

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19. *See infra* Part III.

20. *See id.*

21. *See, e.g.*, Phil Hampton, *Privatization Has Value, Candidates Agree; Caution Urged by Contenders*, PRESS-ENTER. (Riverside, Cal.), March 11, 1996, at B1 (noting that privatization advocates contend that the private sector is more efficient and can operate at lower costs than government).

II. PRIVATIZATION AND THE DEBATE OVER PUBLIC ACCOUNTABILITY

Privatization can take many forms. The most common form of privatization, called "contracting out,"[22] happens when the government contracts with a private entity to provide a service previously performed by the government, or to provide a service for or on behalf of a government entity.[23] Services such as fire protection, transportation, jails, and health care have been delegated to private entities, and litigation over access to records formerly maintained by the government has erupted. The debate over the value of privatization and its impact on public access laws centers around this "contracting out" form of privatization.[24]

As governments continue to have difficult financial times,[25] contracting out has become a widely considered option. Its success, however, has been mixed. For example, in 1996 the City of Indianapolis contracted with Ameritech to provide online computer access to many of the city's public records. Although both the city and the private company were initially enthusiastic about more efficient and inexpensive access to records,[26] in the end the venture proved unsuccessful. This was primarily because Ameritech found that the cost of the venture was too high; the result was a higher cost of access than if the records had been in the hands of government.[27] Consequently, Ameritech announced in June 1997 that it would not seek to renew its contract, which expired in 1998.[28] Even so, the city plans to seek out another contractor to provide the online services, because officials believe that privatization can be more efficient if done in an effective way.[29]

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22. *See* Mays, *supra* note 1, at 43.

23. *See id.*; *see also* Bunker & Davis, *supra* note 3, at 7-8.

24. A less common form of privatization is called "load shedding," which occurs when a government sells its public facility to a private entity or completely privatizes a portion of traditionally public services. *See* Mays, *supra* note 1, at 44. It has been pointed out that governments are free to contract out public services, and true load shedding does occur in some cases. *See id.* However, the majority of cases involve a government entity contracting with a private entity to provide a service to the public.

25. *See* Mays, *supra* note 1, at 42 (discussing the financial woes of city governments).

26. *See* Jim Beck, *City Gets Proposal To Put Records Online*, EVANSVILLE COURIER, Mar. 28, 1996, at 5A (announcing the discussions between the city and Ameritech).

27. *See* FLA. SUNSHINE SUMMIT, *supra* note 10, at 10 (comments of Kyle Neiderpreum). Neiderpreum, who is also a reporter for the Indianapolis Star, said Ameritech wanted the records to be a money-maker, but the online service fell below its expectations. *See id.* Additionally, concern was expressed over the rising price of the records under the new system, even though their value was enhanced by computer access. *See id.*; *see also* Rebecca Buckman, *Computer Retrieval of Records a New Wrinkle in Public Access*, INDIANAPOLIS STAR, Mar. 21, 1994, at A1 (discussing the prohibitive costs of subscribing to an online public records access service).

28. *See* Theobald, *supra* note 11.

29. *See id.* In fact, the city is looking to expand the online services to include property tax records, land records, and traffic accident reports. The government still perceives that

Privatization has continued even in the face of difficulties because governments still believe there are benefits to contracting out certain government services.[30] In Arizona and Texas, governments have found it financially beneficial to contract out the operation of state prisons.[31] In Ohio, independent firms have screened candidates for big-city police jobs, shielding the process from public access by claiming they do not fall under the state access law.[32] In Illinois, the state press association fought to maintain public access when a judge allowed Ameritech and its CivicLink project to manage all court records.[33] Members of the media from all over the state of Illinois became alarmed when they realized that CivicLink would have exclusive control of all the records within the first seventy-two hours of existence before disbursing the information to the public.[34] As with Ameritech's efforts to manage documents in Indianapolis and Prince George's County, Maryland, members of the Illinois press worried that this privatization effort would effectively cut off their rights to free and open access.[35]

Even though it has detractors, advocates of privatization have continued to push for more contracting out to private entities. Since the late 1980s, privatization of services has gained ground as local governments have competed with private companies to see which can provide the services in a more efficient and cost-effective manner.[36]

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computer access could be more efficient and cost-effective, as well as more convenient for the public, even though Ameritech wanted to focus its efforts in "another direction." *Id.*

30. In fact, one of the most ardent supporters of access to government information, Jane Kirtley, has also acknowledged that privatization can possibly be a success because it could make access to government information cheaper and more efficient. *See* FLA. SUNSHINE SUMMIT, *supra* note 10, at 10. However, Kirtley stressed the need for a mechanism to ensure that the public can get records at the same or lower cost than when the government was the vendor, which did not happen in the Indianapolis case. *See id.*; *see also* Louis Uchitelle, *Competition Called Key to Success with Privatization*, ORANGE COUNTY (CAL.) REG., Apr. 26, 1988, at A6 (stating that competition can force private agencies to bid for services at a lower cost than the government could provide them, helping to realize the efficiency and cost benefits of privatization); Thompson, *supra* note 10 (discussing the problems Texas has faced in its efforts to privatize the state's prisons).

31. *See* Barbara Croll Fought, *Privatization Threatens Access*, QUILL, Sept. 1997, at 8.

32. *See id.*

33. *See id.* These records were to be stored electronically and then sold to the public for profit.

34. *See id.* The media successfully won their battle with CivicLink when county clerks began refusing to sign exclusive contracts with CivicLink, and eventually legislators banned future contracts. *See id.* at 9. As of late 1997, Ameritech said it was abandoning the CivicLink project, and other large information vendors belonging to the Information Industry Association have stated that they do not favor exclusive agreements to manage information. *See id.*

35. *See id.*

36. *See* Uchitelle, *supra* note 30. Uchitelle mentions jails and fire departments in Florida and garbage collection in Phoenix, Arizona, as examples of services whcih the government and private companies were bidding against each other to provide. *See id.* In some cases the government won the bidding war, but in others, such as a jail in Bay County, Florida, a private corporation took over the services. *See id.* Uchitelle also gives examples

Today's advocates of privatization stress the importance of careful study for determining which services would benefit from privatization based on a cost-benefit perspective.[37]

Studies of the benefits of privatization have continued as cities experience financial troubles. For example, in 1996 the City of Atlanta, even with its expected revenue from the Olympics, still considered privatization in the face of what was called poor fiscal health.[38] In Miami, the city did not want to lose the revenue generated by the Miami Heat basketball team, so it recruited a local businessman to facilitate talks with the team, a move that had the effect of shielding the entire deal-making process from the public.[39] The businessman refused to grant public access to the records dealing directly with public funds and bonds, even though such records would obviously have been public had the government itself conducted the negotiations. Thus, the Miami government was able to privatize a specific service, even though it related directly to taxpayer money. In so do-

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of services, such as data processing, vehicle maintenance, street-light repair, hospital management, and park maintenance, that have come under increasing privatization. *See id.* In short, Uchitelle makes clear that during the Reagan years, competition was seen as the key to more cost-efficient services, as governments were wasting money and finishing fiscal years in the red. *See id.* Even so, lost in the debate were the effects on public access to records previously held by the government.

37. *See* Hampton, *supra* note 21. Hampton points out that in 1996, candidates for county supervisor in Riverside County, California, were pushing for continued privatization efforts, mentioning hospitals, jails, data processing, bill collecting, and street sweeping as viable areas for privatization. *See id.* Even though research into the viable areas has been stressed, advocates of privatization have still called for "massive privatization" because they still perceive that the profit-motivated private sector is more efficient than the government. *Id.* Hampton points out that the country "farms out" millions of dollars to private companies to provide services, and entire units of government have been shut down with a resulting loss of government jobs. *Id.* Based on this information, it appears that privatization is not a fading remnant of the Reagan era, but is still going strong as governments seek to rid themselves of public costs.

In fact, in the age of the Information Superhighway, local governments say they simply cannot afford to put public records online and manage them; therefore private vendors are a necessity. *See* Fought, *supra* note 31, at 10. These privatization efforts have a profit goal as well, with one government in California bringing in as much as $400,000 per year. *See id.* Such private computerized databases are resulting in higher fees for public access, as the public now has to pay for the computers, software, upgrades, and employee time in accessing the records. *See id.* This has led members of the media to stress that while putting records online is commendable because of easier access, it should not result in higher fees for records that have already been paid for by the public. *See id.*

38. *See* Darryl Fears, *Suggestion of Privatization Opens Gap in Atlanta Politics*, ATLANTA J. & CONST., May 4, 1996, at 2C. In fact, a Rotary Club member said the city's fiscal health was so bad that it was "nearing collapse." *Id.* The member "offered a simple solution for what he called the city's bloated employee rolls and sluggish services: contract work currently handled by the city to private companies." *Id.*

39. *See* Fought, *supra* note 31, at 11. The businessman who refused to grant the media access to the records surrounding the new deal with the Miami Heat was P. Anthony Ridder, chairman and CEO of Knight-Ridder, Inc., owner of the *Miami Herald*. *See id.* The *Miami New Times* eventually sued Ridder and obtained access to the files, but the judge never ruled on whether Ridder was subject to public access, even though he was helping to create records relating directly to public business. *See id.*

ing, whether intentionally or unintentionally, the city temporarily shielded a deal-making process involving public money from public scrutiny. Other areas in Florida and Indiana have also contracted out services in the face of fiscal difficulties, providing further evidence that privatization is far from a dying phenomenon.[40]

Although it is still going strong, privatization is not without its share of detractors. Some commentators have argued that privatization hurts the public sector and employees because unlike government, private entities are not subject to constitutional limitations.[41] Government employees are also arguing against privatization because they say it hurts their ability to negotiate employment contracts, limits the government's oversight of vital public programs, causes layoffs, and in fact insults the quality of their work by suggesting they are not efficient.[42] Others have suggested that the privatization process carries risks of contract disputes and government overcharges, hurts the status of labor unions, and reduces wages and benefits, while divesting the taxpayer of former public benefits; critics further complain that the issue is over-politicized.[43] Still others claim that any cost savings from privatization are minimal at best and are outweighed by the loss in oversight that goes with privatization.[44] Minorities and elderly citizens also worry that the private sector will neglect the increasing commitment government has shown to

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40. For example, again in Indianapolis, a health department performing a supplemental government function has been formed by the city as a private agency with no substantial links to the government. *See* FLA. SUNSHINE SUMMIT, *supra* note 10, at 11 (comments of Kyle Neiderpreum). It has been pointed out that two Florida counties have privatized their jails. *See id.* (comments of attorney Pat Anderson). Additionally, Dade County, Florida developed a Geographic Information System (GIS) digital land database and then allowed Florida Power and Light to acquire the copyright, giving the county half the profits. *See* Fought, *supra* note 31, at 9.

One newspaper editor in Miami fears that this exclusive copyright can prevent public access to the mapping information. *See* FLA. SUNSHINE SUMMIT, *supra* note 10, at 5 (comments of Dan Keating, Research and Technology Editor, *Miami Herald*). Joel Campbell, Vice President of the National Freedom of Information Coalition, has pointed out that private companies are selling government records in states such as Utah, Idaho and Nevada, just to name a few. *See id.*; *see also* Fought, *supra* note 31 (providing several examples of traditional government functions now being performed by private entities).

41. *See, e.g.*, Mays, *supra* note 1, at 45. Mays cites the Fourteenth Amendment due process requirements as an example. *See id.* In order for such requirements to apply to the private sector, the author points out that a "state action" approach must be found by the courts. *Id.* at 45-46.

42. *See* Hampton, *supra* note 21.

43. *See* Elizabeth Moore, *Doling Out Services*, NEWSDAY, Apr. 15, 1996, at C1. Moore provides a good overview of privatization issues and examples in the State of New York and the rest of the nation, actually calling privatization a "worldwide movement." *Id.* Recent successes and failures of privatization are highlighted, with an eye toward the future as Gov. George Pataki of New York seeks to employ a commission to help farm out an increasing number of state services and buildings to private entities. *See id.*; *see also* Hampton, *supra* note 21; Uchitelle, *supra* note 30 (giving similar examples).

44. *See id.*; *see also* Hampton, *supra* note 21 (suggesting that some privatized services are still too risky when compared to minimal benefits gained, such as law enforcement).

hiring African Americans and retaining older Americans.[45] Lastly, privatization critics worry that private companies will become wasteful and ineffective in providing important public services.[46]

Although the debate over privatization has raged since the 1980s, only in the 1990s have media professionals made their voices heard over the potential impact on the watchdog role of the media and the public's right to know.[47] Members of the media have realized that because most freedom of information laws do not explicitly reach private entities, the entities may refuse to release previously public information, or at least force the media or the public to engage in costly litigation.[48]

Privatization may be desirable in itself, but it should not come without statutory or contractual provisions leaving public accountability intact.[49] Not only should the public be able to monitor the private company's activities, but the monitoring should be on the same terms as when the public agency was the information vendor.[50]

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45. *See* Uchitelle, *supra* note 30; *see also* Fears, *supra* note 38.

46. *See* Fears, *supra* note 38. It has been suggested that this wastefulness comes from increased spending and higher fees charged by private entities. *See id.* Fears cites a private health care company in Georgia that billed the state for such things as luxury cars and jets. *See id.* In an attempt to solve the wastefulness problem, it has been suggested that contract requirements for quarterly reports could be built into privatization agreements. *See id.*

47. *See, e.g.*, Elliot Krieger, *Privatization Raises Issues of Accountability*, PROVIDENCE J.-BULL., Dec. 15, 1996, at 7B.

48. *See id.* The Article discusses the refusal by private companies to release information because they do not believe they are accountable under access laws, citing the welfare system in Wisconsin as an example of a private company that has been determining eligibility standards in that state. One critic of the privatization of the Wisconsin system stated, "'And if you don't know what those standards are, if you have no access to the welfare requirements, then how can you monitor?'" *Id.* (quoting Bill Kovach, curator of the Nieman Foundation at Harvard University).

49. *See, e.g.*, Staff Editorial, *Private Contracts: Armbrister Bill Would Provide Greater Public Access*, HOUSTON CHRONICLE, Apr. 29, 1997, at A18. The editorial argues that a proposed bill making contracts between private companies and public agencies, totaling at least $1 million, a matter of public record does not go far enough—it should include all contracts. *See id.*

50. *See, e.g.*, David Poulson, *Bill May Ensure Public Tracks Spending*, GRAND RAPIDS PRESS, Apr. 1, 1996, at C3. One example the article gives is charging fees for copying documents. Although government agencies frequently waived fees for small copying jobs, the article states that one private company has charged a $17-per-hour labor fee for small jobs. *See id.* Fearing that private companies waste money and raise costs (as in the Indianapolis case), one Michigan legislator has proposed a bill that would allow the public to track private spending under public contracts. *See id.*

In answering the concerns about public oversight of private companies performing public functions, some have suggested that the most common way to ensure this would be to include a provision in contracts that requires the private company to abide by the state's freedom of information laws. *See* Buckman, *supra* note 27. Additionally, the public could gain access to such records by requesting that the public body obtain them from the private entity on its own behalf, a right most governments retain when they contract out services. *See id.* Critics are not comforted by these arguments, claiming that the government has nonetheless failed to monitor private firms on behalf of the public. *See id.* (citing the exam-

Members of the media have claimed that fears of substantially reduced access to information from private companies have become a reality; thus, state legislatures need to solve the problem.[51] Numerous examples have been given where, the media claim, "once-public information has disappeared behind the curtain of corporate privacy."[52] Press members say they have been denied access to tax collection records, prisons, health data, and even the state's compiled laws.[53] Additionally, private entities have been successful in gaining legislative exemptions from open records laws in order to nullify any claim that the public should have access.[54] In reaction, the media has been active in seeking support for public-access bills in states such as Michigan, Texas, and Connecticut to ensure that records in the hands of private entities remain open to the public.[55]

While little attention was given to access issues in the 1980s when privatization first began to gain ground, scholars have begun to take notice of freedom of information problems in the 1990s. For example, Professors Matthew Bunker and Charles Davis have pointed out that by creating, maintaining, and controlling previously public records, private companies are controlling access, and that they are often "at odds with the very purpose of public records laws."[56] Citing several disputes between private companies and the public seeking records, the authors state that such disputes likely represent a growing trend.[57]

Consequently, it is necessary for the courts to clarify the role of public-records laws in the face of growing privatization, because state statutory definitions have been inadequate and the legislatures have not implemented changes.[58] This clarification is especially relevant due to continued privatization not only across many types of services, but within specific public institutions as they privatize food services,

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ple of the City of Indianapolis' failure to monitor a private company that did not seek public bids for construction projects after assuming operation of a municipal golf course).

51. *See* Staff Editorial, *supra* note 49; Don Noel, *Privatization Shouldn't Reduce Public Information*, HARTFORD COURANT, Apr. 16, 1997, at A11.

52. Noel, *supra* note 51 (discussing privatization contracts in Connecticut).

53. *See id.* The article again stresses that the more common trend is not to deny total access to information, but to instead allow access at a "marked-up price." *Id.*

54. *See, e.g.*, FLA. TODAY, *supra* note 10 (discussing the successful move by veterinarians to seal off pet records from the public).

55. *See* Noel, *supra* note 51 (stating that public scrutiny is necessary to ensure that the process remains on the "straight and narrow," and discussing a Connecticut bill containing provisions to ensure that information in private hands remains open to the public); Poulson, *supra* note 50; Staff Editorial, *supra* note 49.

56. Bunker & Davis, *supra* note 3, at 5.

57. *See id.*

58. *See id.* at 6. While the authors point out that state statutes and judicial decisions do not adequately deal with the problem of privatization and freedom of information, they do not discuss the decisions of all 50 states in great detail or analyze the potential impact of court approaches. This Article provides such an analysis. *See infra* Part III.

health care, and other services.[59] In response to arguments concerning the benefits of privatization (efficiency and competition), Bunker and Davis suggest that state courts take a public function approach under which private entities performing a formerly public function would remain accountable under the freedom of information laws.[60]

In short, privatization raises a number of issues that have gained prominence as public bodies continue to turn to privatization as an option in the late 1990s. Whatever the arguments for or against privatization, it is obvious that as long as some legislatures remain silent on the issue, state courts will face decisions that require balancing the arguments and staying in tune with the spirit of the access laws. All fifty states have enacted access laws, but overwhelmingly their legislatures have not accounted for the privatization trend. Therefore, the courts must tackle the issue in the absence of statutory amendments. The next section will show that how readily the information flows depends on where in the country a person makes a request, and who makes the request.

III. STATE COURTS AND PRIVATE ENTITIES SUBJECT TO ACCESS LAWS

Critics have argued that state courts have not effectively handled the privatization issue and how it affects public access under freedom of information statutes.[61] Few courts have actually dealt with the issue of complete privatization, instead handling cases in which governments have delegated certain powers to private entities.[62] However, courts in thirty-four states have rendered decisions interpreting when a private entity is a "public agency" under freedom of informa-

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59. *See, e.g.*, Carol DeMare, *Corrections Chief Pans Private Prisons*, TIMES UNION (Albany, N.Y.), June 3, 1997, at B1 (discussing a speech by New York State Corrections Commissioner Glenn Goord in which he stated that private prison companies are only motivated by profit and that the state can do an equally cost-effective job of corrections); Nick Gillespie, *Accountability Ensures Justice for Private Prisons*, LAS VEGAS REV. J., Sept. 29, 1997, at 6B (discussing abuses by private prison guards that have resulted in government cancellation of contracts, and stating that these economic consequences can prevent private companies from providing inadequate services); *Prison Privatization Is No Panacea*, HARTFORD COURANT, Aug. 24, 1997, at C2 (also discussing abuse of inmates by guards in private prisons, and inferring that such abuses could not be discovered absent protection under freedom of information laws); Thompson, *supra* note 10 (stating that 18 states have private prisons, with Texas and Florida leading the pack in terms of the number of private beds).

Accountability and public access to privatized federal prisons has also been a concern in recent years, with commentators arguing that private prison operations and records should be declared "public" under the Federal Freedom of Information Act. *See generally* Nicole B. Casarez, *Furthering the Accountability Principle in Privatized Federal Corrections: The Need for Access to Private Prison Records*, 28 U. MICH. J.L. REFORM 249 (1995).

60. *See* Bunker & Davis, *supra* note 3, at 24; *see also* FLA. SUNSHINE SUMMIT, *supra* note 10 (comments of Jane Kirtley stating that privatization can work if it is ensured that private companies remain subject to freedom of information laws).

61. *See* Bunker & Davis, *supra* note 3, at 13-14.

62. *See id.*

tion statutes and when the entity's records are "agency records."[63] These decisions have ranged from flexible, access-favoring applications of freedom of information statutes to more restrictive, access-limiting applications due to more explicit definitions found within the statutes themselves.

Classifying into two groups the various approaches the states use in determining when a private entity is subject to access laws is a difficult task. The terms "flexible" and "restrictive" are not always perfectly descriptive, as sometimes a court using a flexible approach denies access to records because of the absence of numerous factors which would signal the public nature of the entity or records. On the other hand, restrictive approaches sometimes allow access to documents if a determinative factor is present.

Under the flexible approaches, courts do not limit access to cases in which a single determining factor is present, such as public funding or day-to-day control by government. Instead, the flexible courts review a variety of factors and do not pigeonhole access based on the presence, or absence, of one single, determining factor. In contrast, courts in the restrictive categories only allow access to private entities in cases where a specific factor is present, such as a certain level of public funding or control by government. These courts do not look at multiple factors, but instead use this approach, primarily because they must work with more explicit definitions of "agency" and "agency records" under their state access laws, which limit judicial discretion to cases where a certain factor is present.

A. The Flexible Approaches Favoring Access

Twenty-two states' courts that have discussed the issues of privatization and when a private entity is subject to freedom of information laws can be classified as flexible. The three "sub-approaches" used by the states in this section can be called the "totality of factors" approach, the "public function" approach, and the "nature of records" approach. Each of these approaches is described below.

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63. Bunker and Davis state, "[T]he issue [of privatization] has arisen in relatively few cases, and most jurisdictions have not addressed it." *Id.* at 13. However, the authors were probably referring to "pure" privatization that results when governments completely turn over an operation. *See id.* at 13-14. This author found that 34 states have in fact handed down public access decisions affecting private entities and the public, even though some may not involve pure, large-scale privatization. Many of the cases cited in this section actually deal with the delegation of power to private entities, an issue Bunker and Davis say has arisen in a "handful" of cases. *See id.* at 13. This Article does not attempt to extensively differentiate between the factual types of privatization, instead opting to focus on the way courts have dealt with people seeking information from private entities. Arguably, the "test" used by a court can determine when access will be granted, and differing facts can produce a different outcome.

1. The "Totality of Factors" Approach: Connecticut, Florida, Maryland, North Carolina, Oregon, and Kansas

This sub-approach can be classified as flexible because the six states using it look at a number of factors to determine if a private entity should be subject to freedom of information laws. One factor alone will not suffice to grant access, but neither will the absence of one factor suffice to deny it. Connecticut was the first state to develop this approach. In *Connecticut Humane Society v. Freedom of Information Commission*,[64] the Connecticut Supreme Court explained that in order for a private entity to be subject to the state Freedom of Information Act, it must be the "functional equivalent of a public agency."[65] Deciding whether an entity is the functional equivalent of a public agency involves considering a number of factors, including:

1) Whether the entity performs a governmental function;

2) The level of government funding;

3) The extent of government involvement or regulation; and

4) Whether the entity was created by the government.[66]

The court stressed that no one factor is determinative, and that all relevant factors need to be analyzed on a case-by-case basis.[67] For instance, it was pointed out that a private entity could be a public agency under state law even without government funding.[68] Applying this totality of factors test, the court still held that the Humane Society was not a public agency, in part because there was no government funding (even though the Society was created by government charter).[69] The Society was not required to undertake certain activities that it was authorized by statute to undertake (there was little real regulation), and the government did not control the Society or review its activities.[70] While the court was willing to take a close look at the exact nature of the private entity to determine if it should be subject to access laws, it recognized that one factor could not be determinative in either direction, and that the absence of enough factors would prevent a private entity from being subject to the state Freedom of Information Act.[71]

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64. 591 A.2d 395, 397 (Conn. 1991).
65. *Id.*
66. *Id.*
67. *See id.*
68. *See id.*
69. *See id.* at 398-99.
70. *See id.*
71. *See id.* The "functional equivalent" perspective utilizing a number of factors was first used in Connecticut in 1980 in *Board of Trustees of Woodstock Academy v. Freedom of Information Commission*, 436 A.2d 266, 270-271 (Conn. 1980). In that case, the facts tipped the balance in favor of finding that the Woodstock Academy, which provided public

Recent Connecticut appellate court opinions have addressed a number of factors under the functional equivalence test for determining when an agency should be open to the public. In *Domestic Violence Services v. Freedom of Information Commission*,[72] the Appellate Court of Connecticut held that a domestic violence services organization was not a public agency under the state's Freedom of Information Act because most of the indicia of functional equivalence to government were not present.[73] The government did not create the organization, it had no power to govern or to make decisions or regulations, and it was not controlled by the government.[74] Thus, the organization was not the functional equivalent of the government, even though it received more than half of its funding from government entities, it was subject to government audit and contract, and the government had a direct and growing interest in the prevention of domestic violence.[75] The court decided the organization could not be considered the functional equivalent of state government because it was not subject to the type of "direct, pervasive or continuous regulatory control" necessary to create the equivalent of a government agency.[76]

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education supported by public funds and regulated by the state, was a public agency under the state Freedom of Information Act. *See id.* at 271. In *Woodstock Academy*, the "functional test" factors used by the Humane Society court were set out for the first time, but the latter court offered a more detailed discussion of how the test should be applied in the future. *See Connecticut Humane Soc'y*, 591 A.2d at 397-99. The court in *Woodstock Academy* did point out that a "truly" private entity would not be subject to the Freedom of Information Act, and the Humane Society case provides a good example of what the court would consider a truly private entity—one where a majority of the factors are not present. *See Woodstock Academy*, 436 A.2d at 271; *see also* Connecticut *Humane Soc'y*, 591 A.2d at 399.

72. 704 A.2d 827 (Conn. Ct. App. 1998).

73. *See id.* at 829.

74. *See id.* at 830-33.

75. *See id.* at 830-34. The court stressed that "[t]he key to determining whether an entity is a government agency or merely a contractor with the government 'is whether the government is really involved in the core of the program.'" *Id.* at 832 (quoting Forsham v. Califano, 587 F.2d 1128, 1138 (D.C. Cir. 1978) aff'd, 445 U.S. 169 (1978)). Because the government in this case merely contracted with the organization and left it the bulk of control over the services, the organization could not be considered the equivalent of government. *See id.*

76. *Id.* at 833 (quoting Hallas v. Freedom of Info. Comm'n, 557 A.2d 568 (Conn. Ct. App. 1989)); *cf.* Town of Windham v. Freedom of Info. Comm'n, 711 A.2d 738 (Conn. App. Ct. 1998); David v. Freedom of Info. Comm'n, No. CV 970395384, 1998 WL 83685 (Conn. Super. Ct. 1998). In *Windham*, the court held that affidavits prepared and used by a private attorney to defend the town were not public records because they were never used by the city or admitted into evidence, but were instead used only privately by the attorney. *See Windham*, 711 A.2d at 741. Thus, none of the control factors that would make the documents public were present. *See id.*

In determining that the New Haven Community Television Company was not a "public agency" under the Act, the *David* court also found that none of the factors for functional equivalence were present, since the company only controlled educational and governmental channels, functions that were reserved for the media and were not government functions. *See David*, 1998 WL 83685, at *2. Additionally, the company was primarily funded through

The Florida courts have been even more detailed in their application of a totality of factors or functional equivalent approach. The seminal case in determining when a private entity will be subject to the state public records law is *News and Sun-Sentinel Co. v. Schwab, Twitty & Hanser Architectural Group, Inc.*[77] In that case, the Florida Supreme Court took the Connecticut approach a step further, listing nine factors[78] that can be used to determine if a private corporation is "acting on behalf of any public agency" under the public records law:[79]

> 1) The level of public funding;
>
> 2) Commingling of funds;
>
> 3) Whether the activity was conducted on publicly owned property;
>
> 4) Whether services contracted for are an integral part of the public agency's chosen decision-making process;
>
> 5) Whether the private entity is performing a governmental function or a function which the public agency otherwise would perform;
>
> 6) The extent of the public agency's involvement with, regulation of, or control over the private entity;
>
> 7) Whether the private entity was created by the public agency;
>
> 8) Whether the public agency has a substantial financial interest in the private entity; and
>
> 9) For whose benefit the private entity is functioning.[80]

Applying this totality of factors test, the court held that the architectural company was not acting "on behalf of any public agency" when it was hired by the county to perform professional architectural services for the construction of a school.[81] Nonetheless, the court

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private monies, and although it was subject to government regulations, the amount of day-to-day government control was very limited. *See id.* at *2-3. In short, none of the traditional factors that would make the company the functional equivalent of government were present in the *David* case. *See id.*

77. 596 So. 2d 1029 (Fla. 1992).

78. *Id.* at 1031. The court stated that the test is not limited to these factors, and others may be used as well. *See id.*

79. FLA. STAT. § 119.011(2) (1995). The language "acting on behalf of any public agency" is never defined in the statute, leaving the courts discretion in their interpretation of what constitutes an "agency." *Schwab*, 596 So. 2d at 1031 (reciting the definition given to the term by Florida courts).

80. *Schwab*, 596 So. 2d at 1031.

81. *Id.* at 1031. This was because the firm was not created by the school board, public funds were only given for services rendered, the school board did not control the firm or delegate any part of its decision-making processes to the firm, the firm did not perform a school board function or operate for the benefit of the firm, and the school board did not

stressed that it was taking a flexible and cautious approach by using a broad definition of "agency," which would ensure that a public agency could not avoid disclosure under Florida law by contractually delegating its responsibility to a private entity.[82]

The *Schwab* court's totality of factors approach was essentially a codification of many factors previously used by Florida District Courts of Appeal to determine when a private entity should be subject to Florida's public records law.[83] Since the *Schwab* decision, Florida courts have emphasized that one factor alone will not be determinative, and that private entities must actually be delegated some sort of public function.[84] But if the private entity is doing more than just providing a specific, contracted-for service to the public agency, the private entity is likely to be subject to Florida's access law. This is because when the entity is taking over some public role, a number of the factors spelled out in *Schwab* are likely to be present.

For example, in *News-Journal Corp. v. Memorial Hospital-West Volusia, Inc.*,[85] it was held that a lessee running a hospital on behalf of a public authority responsible for public services was a public

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perform a government function. *See id.* at 1032. Thus, the totality of factors test was not met because none of the factors were present.

82. *See id.* at 1031.

83. *See, e.g.*, Booksmart Enters., Inc. v. Barnes & Noble College Bookstores, Inc., 718 So.2d 227 (Fla. 3rd. DCA 1998) (finding that forms connected with the university's selection of textbooks were "public records" because they were prepared "on behalf of" a public agency, the university); Sarasota Herald-Tribune Co. v. Community Health Corp., 582 So. 2d 730, 731-734 (Fla. 2nd DCA 1991) (holding that a private health corporation was "acting on behalf" of the county board under the public records law where it was created and existed for the purpose of serving the public, the county could influence decision making through sitting on the corporation's board, the county was set to get funds from the corporation upon its dissolution, and public funds were provided to the corporation); Parsons & Whittemore, Inc. v. Metropolitan Dade County, 429 So. 2d 343, 346 (Fla. 3rd DCA 1983) (finding that engineering and construction firms merely entered into business contracts with the county to perform services, without performing any governmental function or participating in any decision-making process); Schwartzman v. Merritt Island Volunteer Fire Dep't, 352 So. 2d 1230, 1231-32 (Fla. 4th DCA 1977) (holding that a nonprofit, volunteer fire department was "acting on behalf of" a public agency because it was completely entrusted with fire protection, was operating on county property, and was funded in part by public monies).

See also Robert Rivas & J. Allison DeFoor II, *When Is a 'Private' Document a Public Record?*, 67 FLA. B.J. 52 (1993), for a brief analysis of several pre-*Schwab* Florida cases and how they fit together to determine when a private entity may be subject to Florida's public records law. Rivas and DeFoor recognize the flexible approach of Florida courts by discussing the large number of private entities that could find their records subject to access, stating, "A surprisingly broad range of lawyers should familiarize themselves with the subject." *Id.*

84. *See, e.g.*, Harold v. Orange County, 668 So. 2d 1010, 1011-12 (Fla. 5th DCA 1996) (finding that a private entity acting as a construction manager for a county's civic center project was a public entity, because although a private entity can contract with the county for services and not be subject to the access law, here the entity had a public obligation to perform a function for the county and to maintain and disclose records to a public body).

85. 695 So. 2d 418 (Fla. 5th DCA 1997), *aff'd*, 729 So. 2d 373 (Fla. 1999).

agency under Florida law.[86] The Fifth District Court of Appeal stated that an entity that merely contracts with a public agency to provide specific services or goods to help the public entity perform its function may not necessarily be subject to the open records law. However, once an entity relieves a public body of one of its functions and uses public equipment and funds to perform that function, it becomes subject to the public records law.[87] Providing a public service that benefits the public and using the public's investment to do so are thus the critical factors.[88]

The Florida Supreme Court recently affirmed *News-Journal*,[89] holding that when the West Volusia Hospital Authority in Deland awarded a forty-year lease to Memorial Health Systems, a private corporation, open government mandates were not changed; therefore, reporters must be allowed to attend hospital meetings.[90] The Court agreed with the district court of appeal that the totality of factors test mandated by the *Schwab* decision indicated that when the government transferred the responsibilities of a public health authority to a private entity, the state's sunshine requirements should continue to apply to that entity.[91] By transferring its publicly mandated responsibilities over the operation and maintenance of county hospitals, the county government was essentially deputizing a private corporation to act for the public's health and thus the totality of factors test weighed in favor of maintaining public access.[92]

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86. *See id.*

87. *See id.* at 420. It should be noted that in addition to statutory law, the Florida Constitution contains a provision for access to government, stating that one has the right to review records of any public body "or persons acting on their behalf." FLA. CONST. art I, § 24. Essentially, Article I makes it impossible for the legislature to unilaterally end Florida's tradition of openness, but the *News-Journal* and other courts have not signaled that the presence of a constitutional provision warrants any differing degree of analysis.

88. *See News-Journal*, 695 So. 2d at 420. The *News-Journal* court based its decision on the facts that the authority had created the private lessee, the private lessee was operating on public property with the help of taxation, its funds were commingled with public funds, the public authority had decision-making authority over the private company, and the private entity was performing a function previously performed by a public body. *See id.* at 421-22; *see also* Stanfield v. Salvation Army, 695 So. 2d 501 (Fla. 5th DCA 1997) (finding that a private organization providing misdemeanor probation services for the county was a public agency because it provided services previously provided by the county); Sipkema v. Reedy Creek Improvement Dist., 697 So. 2d 880, 881 (Fla. 5th DCA 1997) (Harris, J., concurring) (finding that a private security company was not acting on behalf of a county when it simply heightened security on its own property, was not funded or created by the county, and was not controlled by the county in any way).

89. Memorial Hospital-West Volusia, Inc. v. News-Journal Corp., 729 So. 2d 373 (Fla. 1999), *aff'g* 695 So. 2d 418 (Fla. 5th DCA 1997).

90. *See id.* at 379-84.

91. *See id.*

92. *See id.* In a concurrent decision, the Florida Supreme Court also held that an exemption allowing public health boards to meet in private for certain "strategic plan" operations was unconstitutionally overbroad, as the exemption did not define "strategic plan" or properly limit the definition to critical confidential information. *See* Halifax Hosp. Med. Ctr. v. News-Journal Corp., 724 So. 2d 567 (Fla. 1999); *see also Private Managers of Public*

However, it has been argued that even after *Schwab* public access law in Florida is still in a state of confusion. For example, one commentator suggested that *Schwab* significantly narrowed the definition of "public agency" under Florida law, limiting public access even to records held by entities assisted by public funds.[93] The commentator suggested that the totality of factors test was incorrectly applied in the *Schwab* case, arguing that, instead, the architectural firm was clearly the functional equivalent of a public agency. Thus, it was acting "on behalf of" the government in implementing the school board's decisions and by fulfilling a professional responsibility of the board.[94]

To decide whether the private entity is acting "on behalf of a public agency," Robinson states it is only necessary to determine whether its records were created "in connection with the transaction of official business."[95] Ultimately, if the entity is acting for the benefit of a public agency, the applicable records would clearly be connected to the transaction of public business based on the content of the records, not the nature of the entity.[96] Nonetheless, although the totality of factors test has been termed too restrictive, it is actually more flexible than tests used by other states because of its focus on a number of factors (with no one factor determinative). It provides a balancing approach that weighs the facts and interests involved in each case.[97]

Three other state courts have adopted approaches analogous to the totality of factors approach of Connecticut and Florida. In *Abell Publishing Co. v. Mezzanote*,[98] the Maryland Court of Appeals held that an insurance guaranty association was an "agency or instrumentality" under the Maryland Public Information Act.[99] This holding was based on a number of factors, including the interrelationship between the government and private entity, the public purpose of the

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Hospitals Are Subject to State Sunshine Laws, 23 NEWS MEDIA & L. 21 (1999). In other words, the Florida Supreme Court would not allow an end-run around sunshine laws through a broadly worded exemption.

93. *See* Marguerite L. Robinson, *Detectives Following the Wrong Clues: Identification of Private Entities Subject to Florida's Public Records Law*, 22 STETSON L. REV. 785 (1993).

94. *Id.* at 808-811 (arguing that the architectural firm was obviously acting on behalf of the school board because the board was answerable for the firm's actions).

95. *Id.* at 812 (emphasis omitted).

96. *See id.* This would be a very broad approach, because it would make any record pertaining to public business an accessible record. *See id.* at 814-815. Five states do take a "nature of records" approach similar to the author's suggested approach. *See infra* Part III.C.

97. *See* Charles A. Carlson, *Stepping into the Sunshine: Application of the Florida Public Records Act to Private Entities*, FLA. B.J., Nov. 1993, at 71 (arguing that private firms with close relationships to public agencies have "broad" obligations to comply with the public records law, which could hurt the private entity that has to turn over information to its competitors). Carlson states that the totality of factors test determining whether a private entity acts "on behalf of" a public agency does accommodate conflicting interests and is thus warranted, even if it is an unpredictable, case-by-case approach. *See id.* at 74.

98. 464 A.2d 1068 (Md. 1983).

99. *See id.* at 1072-74.

private entity, the degree of government control (lack of independence of the private entity), creation of the entity by statute, and the entity's immunity from tort liability.[100]

Similarly, the North Carolina Court of Appeals has held that a nonprofit county hospital system must release terms of legal settlements because of county commission control, review, and regulation; public funding; operation on leased county property; and operation pursuant to county agreement and bonds.[101] Although the hospital authority had independent authority to govern itself, it was still defined as an "agency" under North Carolina law because the court felt its independence did not overwhelm the county's control.[102] The North Carolina court reasoned that corporate entities can be government agencies when they are delegated public functions, particularly when a number of factors showing the government nature of the entity and its records are present.[103] Like the other courts using the totality of factors approach, the North Carolina and Maryland courts considered many factors without making any one factor determinative of public access.

The Oregon Supreme Court also adopted a totality of factors approach when it denied parents access to the records of a fact-finding team appointed by the school district to investigate problems at the local high school.[104] The fact-finding team was held not to be a "public body" based on the court's analysis of a number of factors: The entity originated from the school board, its function was related to a public body's operation, its scope of authority was narrow, it lacked public funding, it was subject to little control or decision-making authority by the school board and, aside from a few of its board members, it was independent of the school board.[105] Because the investigative team was independent of government and not able to make the board's decisions, the court held that the factors weighed in favor of finding the team not subject to the Kansas Inspection of Public Records Law.[106]

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100. *See id.* at 1072-74.

101. *See* News and Observer Publ'g Co. v. Wake County Hosp. Sys., Inc., 284 S.E.2d 542, 544-49 (N.C. Ct. App. 1981).

102. *See id.* at 547.

103. *See id.* at 548-549. As stated above, the court reiterated these factors: the county's responsibility to supervise and control the system; the county's approval of new board members; the transfer of funds to the county on the system's dissolution; the county lease; the county bond financing of the system; and the county's supervision over the system's corporate existence. *See id.*

104. *See* Marks v. McKenzie High School Fact-Finding Team, 878 P.2d 417 (Or. 1994).

105. *See id.* at 424-25.

106. *See id.* at 426. It could be argued that the court in *Marks* was more restrictive in applying the totality of factors approach, essentially requiring the private entity to be a "functional equivalent" of government for it to be subject to access. However, the totality of factors approach should still be considered flexible because it allows the courts to weigh a

Lastly, the Kansas Attorney General has also adopted a totality of factors approach, although not binding on the State's courts. The Attorney General ruled that the Kansas Turnpike Authority was a public instrumentality with the authority to perform an essential public function and was therefore subject to Kansas' Open Meetings and Open Records Acts.[107] The Attorney General used four main factors to determine if the entity was an agency under the Acts: whether the entity has authority to make government decisions; whether the entity has independent authority in the exercise of its functions; whether the entity is subject to government supervision and audits; and whether the entity accomplishes public ends.[108] Additionally, the opinion stressed the public funding of the entity and subordination to a state political or taxing subdivision as factors to consider.[109] In the Turnpike case, the Authority was an arm of the state created by the legislature to perform an essential government function, and it received and expended public funds.[110] Like the other cases applying the totality of factors approach, the Kansas opinion discussed the importance of interpreting the meaning of "public agency" broadly absent more specific legislative definitions, refusing to turn away access based on the presence or absence of one single factor.[111]

2. The "Public Function" Approach: Georgia, New York, Ohio, California, Louisiana, Missouri, Utah, Kentucky, Delaware, and New Hampshire

This approach, used by ten states, focuses less on a factorial test and more on whether an entity is performing a public function. Although the Georgia Supreme Court has not yet taken up the privatization issue, the most in-depth discussion of this approach came from the Georgia Court of Appeals in *Hackworth v. Board of Education*.[112] In this case, a television station sought the personnel records of school bus drivers employed by a private company providing a service for the school district.[113] Georgia's public records statute covered items received or maintained by a private entity "on behalf of a pub-

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number of factors to determine which ones tip the balance in either direction, without one factor being determinative. *See id.* at 421 n.7, 424-25.

107. *See* 27 Kan. Op. Att'y Gen. 47 (1993), 1993 WL 467822, at *1.

108. *See id.* at *2.

109. *See id.* at *3-4.

110. *See id.* The Attorney General seemed to place great emphasis on the public funding issue because it was spelled out in the Kansas definition of "public agency;" however, the Attorney General still proceeded to lay out other factors in determining that the open meetings and records acts applied in the instant case. *Id.*

111. *See id.* at *4.

112. 447 S.E.2d 78 (Ga. Ct. App. 1994).

113. *See id.*

lic office or agency."[114] However, rather than interpreting this provision to require a totality of factors analysis, the *Hackworth* court stated conclusively that because the school board's responsibility included the hiring of bus drivers, which required personnel records as an integral part of this responsibility, the records at issue were public records, even though the board delegated its responsibility to a private entity.[115] If the private entity is performing a legitimate function of the public entity, it will be subject to the Georgia access law.[116] This approach asks what function is performed by the private entity, rather than posing questions about such issues as control or funding. The purpose of the state act cannot be frustrated by allowing a public entity to delegate its responsibility to a private entity and consequently to escape the law.[117] The *Hackworth* court was more interested in looking at what function the private entity was performing than in enquiring into the entity's specific form.[118]

New York uses an approach similar to Georgia's to determine when a private entity is subject to the state's freedom of information law. The New York Court of Appeals first discussed the state's "broad" definition of records in *Encore College Bookstores, Inc. v. Auxiliary Service Corp.*[119] There, the Court of Appeals held that a booklist maintained by an auxiliary service corporation of the state university had to be turned over to a private bookstore because it was "kept" or "held" by a public agency under the state's Freedom of Information Law.[120] Similar to the Georgia approach, the New York Court of Appeals favored a broad access approach, making the records accessible because the service corporation was created for the

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114. *Id.* at 80. Like Florida, the Georgia Legislature had not provided specifics for this "on behalf of" language.

115. *See id.* at 80-81.

116. *See id.* at 81.

117. *See id.* at 82.

118. Georgia courts have re-emphasized this "public function" approach in recent years by pointing out that the lack of other characteristics—such as public funding—is irrelevant as long as the entity is performing a public function. *See, e.g.*, Northwest Ga. Health Sys., Inc. v. Times-Journal, Inc., 461 S.E.2d 297, 299-300 (Ga. Ct. App. 1995) (holding that the defendant hospital associations were subject to the open records and meetings laws, even though neither received substantial tax support, since they were formed to provide care for the general public, entered into a lease with a public agency, and agreed to operate the hospital for the public good, thus becoming the vehicle through which the public hospital authorities carried out their official duties); Clayton County Hosp. Auth. v. Webb, 430 S.E.2d 89, 92-93 (Ga. Ct. App. 1993) (holding that "public records" include items received and maintained by a private person or entity acting on behalf of a public agency, where corporate affiliates were created as part of the Hospital Authority's reorganization, assets of the Authority were transferred to the affiliates, and the Authority had control of records.). The *Webb* court emphasized that the entities "functioned under the direction and control of the Authority to implement the Authority's duty to provide for public health."). *Id.* at 93.

119. 663 N.E.2d 302, 305 (N.Y. 1995).

120. *See id.* at 306.

benefit of a public university.[121] Because the booklist was kept by the corporation for a public agency, the corporation was performing a public function and the record was a public record, regardless of the purpose for which it had been created, the function to which it related, or whether it was in the possession of the public agency.[122] The court took an expansive approach to defining "public agency" and "public record" under state law, stating that as long as the record was kept for a public agency, a private entity performing a public function was subject to disclosure regardless of other factual circumstances.[123]

The Ohio courts have taken a public function approach similar to New York's. In *State ex rel. Gannett Satellite Information Network v. Shirey*,[124] the Ohio Supreme Court, construing that state's Public Records Act broadly in favor of access, held that contracting out cannot alter the city's duty to provide access to public documents.[125] When a public official contracts with a private entity for assistance in filling a public position, it does not matter if the agency is independent of government as long as it is hired to perform a public function.[126] Thus, when the city manager hired a private consultant to assist in hiring, the private consultant had to turn over application documents to the newspaper.[127] The court emphasized that regardless of its characteristics, the private entity was performing a public function and that a public agency cannot circumvent its access obligations by contracting to a third party.[128] In short, the Ohio court took an expansive approach similar to New York's in holding that as long as the entity is performing a public function for the benefit of a public office, it will be subject to the Public Records Act.[129]

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121. *See id.* at 305.

122. *See id.* at 305-06.

123. *See id.*; *cf.* Consolidated Edison Co. v. Insurance Dep't of N.Y., 532 N.Y.S.2d 186, 188-89 (N.Y. App. Div. 1988) (holding that the liquidation bureau of the state insurance department was not an agency subject to the state's freedom of information law since even though an "agency" includes a government entity performing a function for the state, the bureau served private policy holders and was substantially independent from the state). The court in *Consolidated Edison* seemed to focus on a number of factual factors in determining that the bureau was not an agency under the law, but it stressed that the term "agency" should mean any entity acting on behalf of the state to carry out a public benefit. *See id.* at 189. Thus, the case is not really in conflict with *Encore*'s broad approach.

124. 678 N.E.2d 557 (Ohio 1997).

125. *See id.* at 559-60.

126. *See id.* at 560-61.

127. *See id.* at 561.

128. *See id.* (finding that government entities cannot conceal information by contracting out uniquely public duties to a private entity).

129. *See id.; see also* State ex rel. Toledo Blade Co. v. University of Toledo Found., 602 N.E.2d 1159 (Ohio 1992) (finding that a nonprofit corporation that had solicited and received donations for a public university was a "public office" subject to disclosure law, since it acted as a major soliciting arm of the university and received support from public taxation). The *Toledo Blade* court pointed out that the entity exercised an essential function of

In a recent decision, the Ohio Supreme Court held in *State ex rel. Freedom Communications, Inc. v. Elida Community Fire Co.*[130] that a community fire company was a "public office" under the state public records law, even though it was a privately run, nonprofit organization.[131] This was because the company was organized to provide service to the public, it was supported by public tax funds, and it was performing a function historically performed by the government.[132] These factors essentially made the fire company a public agency because it was performing a function that the government would otherwise perform.[133]

In California, the lower courts have basically adopted the public function test. Once the public entity delegates its duty to provide a public service to a private entity, the private entity is likely to become responsible under California's Public Records Act. In *San Gabriel Tribune v. Superior Court*,[134] the court held that the privately generated financial data relied on by the city in granting a rate increase to a private waste disposal company was a public record.[135] The court ignored the private company's independence because the city had a contractual relationship with the company and the company was providing a public service for the city.[136] Similar to the courts in Georgia, New York, and Ohio, the court in California was less concerned with specific attributes of the private entity and more concerned with the function it was performing.

Another state that focuses on the function performed by the private entity is Louisiana. In *State ex rel. Guste v. Nicholls College Foundation*,[137] the Louisiana Supreme Court discussed the public nature of the funds received by the nonprofit corporation, but it also reasoned that a "public body" under Louisiana law should include

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government, even if it was not supported by public money, and thus it had no isolated, independent existence. *See id.*; *see also* State ex rel. Strothers v. Wertheim, 684 N.E.2d 1239, 1241 (Ohio 1997) (holding a county citizens' ombudsman office, a private, nonprofit corporation, to be a "public office" because it was supported by public funds and established for the purpose of serving the public, thus performing a public function in partnership with the county government); State ex rel. Fox v. Cuyahoga County Hosp. Sys., 529 N.E.2d 443, 444-45 (Ohio 1988) (holding that a hospital rendering services to county residents and supported by county funds was performing a public function and was therefore a "public office").

130. 697 N.E.2d 210 (Ohio 1998).

131. *Id.* at 212.

132. *See id.* at 212-13.

133. *See id.*; *see also* State ex rel. Findlay Publ'g Co. v. Hancock County Bd. of Comm'rs, 684 N.E.2d 1222, 1225 (Ohio 1997) (holding that government entities cannot conceal records by delegating a duty to a private entity, because such an entity essentially assumes the role of government for purposes of the statute).

134. 192 Cal. Rptr. 415 (Cal. Ct. App. 1983).

135. *See id.* at 422. The California Supreme Court has not decided what a "public entity" is.

136. *See id.* at 417, 422.

137. 564 So. 2d 682 (La. 1990).

any "public or quasi-public nonprofit corporation designated as an entity to perform a governmental or proprietary function."[138] Because the private entity in that case, a university alumni foundation, received public funds, promoted the university, and had a close affiliation with the university, it was a "quasi-public" nonprofit corporation performing functions of the college.[139] In short, the Louisiana Court followed the public function approach by holding that once an entity takes on public duties, it becomes subject to access.

The Missouri Supreme Court also adopted a form of the public function approach when it held that a St. Louis board of estimate and apportionment was a "public governmental body," even though it was not created by statute or the state constitution.[140] The court made this decision because the board was created by the city to perform vital government functions, such as the collection of public funds, preparation of the budget, and taxation.[141] It was a public body subject to access because it was charged with performing essential public functions.[142]

The Utah Supreme Court adopted a public function approach by looking at "the nature, purpose, and functions" of Utah's state bar association and holding that it was not a "public office" or "state agency" under the state's access law, even though it was created by the Utah Supreme Court.[143] Official creation or recognition by state statute did not turn the bar into a public agency, because it only provided "specialized professional advice" and did not "participate in the general government of the State."[144] Providing services to practicing lawyers and advising the state supreme court did not make the bar subject to the access law, because it was not performing a public function of a public agency, and it had "no final decision-making authority."[145] Additionally, it had many nongovernmental attributes that weighed against its having a public function, such as independence from the state, liability for taxes and lawsuits, private employees, and private membership.[146]

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138. *Id.* at 685.

139. *See id.* at 687.

140. Cohen v. Poelker, 520 S.W.2d 50, 52-53 (Mo. 1975).

141. *See id.* at 52.

142. Although the board in *Cohen* was not a private entity in the true sense, the approach of the Missouri Supreme Court nonetheless signals an endorsement of the "public function" approach that could likely turn some private entities into "government bodies" under Missouri law.

143. Barnard v. Utah State Bar, 804 P.2d 526, 529 (Utah 1991).

144. *Id.* (quoting Keller v. State Bar of Cal., 496 U.S. 1, 11 (1990)).

145. *Id.* at 529-530.

146. *See id.* at 530. This is a difficult case because the state bar at issue is arguably performing a "public function" similar to the entities in previous cases, even though it has no final decision-making authority. However, the court apparently adopted a somewhat more narrow "public function" approach in this case than in previous cases by requiring some participation in government or decision-making authority. *See id.* at 529.

The Kentucky Court of Appeals recently held in *Kentucky Central Life Insurance Co. v. Park Broadcasting of Kentucky, Inc.*[147] that neither an insolvent insurance company nor a court-appointed rehabilitator were public agencies as defined under the Kentucky Open Records Act.[148] This decision was made because the rehabilitator occupied and performed a separate role from his duties as the regulator of the state's insurance department, and he did not perform a public function when he simply stepped into the shoes of a private insurance company.[149] The court held that a "public agency" subject to access meant an entity created to perform a government function, and that protecting insureds and creditors was not traditionally a government function.[150]

Lastly, two other states appear to follow a version of the public function approach. The Delaware Supreme Court has held that when an authority performs essential public functions, it is a public agency partly because it is "specifically charged . . . to advise or make recommendations" for a government entity under Delaware law.[151] However, the court seemed to base its decision at least partially on the fact that the solid waste authority at issue received about $800,000 in public funds.[152] In addition to performing a public function, the authority was also supported by and expending public funds.[153] This approach by the Delaware Supreme Court is basically a "hybrid" public function approach because the court did not make clear whether it

147. 913 S.W.2d 330 (Ky. Ct. App. 1996)

148. *See id.*

149. *See id.* at 334-35.

150. *See id.* at 335. The court also seemed to acknowledge other factors present in the case, including government control, financial involvement of the government, and the status of the entity's employees. *See id.* These factors helped the court conclude that the rehabilitator was not "functioning as a unit of government" because he essentially stepped into the shoes of the leaders of a private insurance company. *Id.* at 335. Arguably, the factors seem to suggest that the court was looking at a more narrow version of the public function approach—an approach focusing on the functional equivalence of the agency in question. It is unclear what the court would do in a different case, because here the court found that the rehabilitator was not performing any public function. However, two years earlier, the Kentucky Attorney General had suggested that:

> A contractor to a governmental entity . . . must accept certain necessary consequences of involvement in public affairs. Such a contractor, whether a corporation or an individual human being, runs the risk of closer public scrutiny than might otherwise be the case. Such a contractor, in our view, loses any character of a "private individual."

94 Ky. Op. Att'y Gen. 27, 1994 WL 109053, at *1, *4 (1994) (quoting earlier opinions). While recognizing the trend toward privatization, the Attorney General stated that private providers become publicly accountable and subject to public access. *See id.*

151. Delaware Solid Waste Auth. v. News-Journal Co., 480 A.2d 628, 632-33 (Del. 1984).

152. *See id.* at 630. Additionally, the solid waste authority was created by statute to develop a state-wide solid waste plan, and it had hired state employees. *See id.* at 629, 632-33.

153. *See id.* at 629-30. The public funds approach can be characterized as a more restrictive approach limiting access to one determinative factor. *See infra* Part III.B.1.

would hold that a private entity is subject to access solely on the basis of its performance of a public function, or whether public funding would be necessary.

New Hampshire's approach is also similar to the public function approach, but it is difficult to fit into a category. In *Bradbury v. Shaw*,[154] the New Hampshire Supreme Court granted access to the meetings and records of a mayor's industrial advisory committee.[155] The committee worked for the city, and it was subject to New Hampshire's Right to Know Law even though it was not created by statute.[156] It was subject to the law because it performed a public function. However, the court's future approach remained unclear because it stressed that "[n]ot all organizations that work for or with the government are subject to the right-to-know law."[157] Like Delaware, New Hampshire's approach appears to fall under the public function category, but its future application remains ambiguous. This approach, by focusing on an entity's function, provides more flexibility than requiring specific factors such as funding, because the function test makes specific features of the entity or record irrelevant as long as the entity is functioning for the public.

3. The "Nature of Records" Approach: Colorado, Maine, Minnesota, Montana, Washington, and Wisconsin

The third flexible approach can be called the "nature of records" approach. The six states following this approach focus on the public or private nature of the records involved, as opposed to focusing on the function and makeup of the private entity itself. For example, one Colorado court used this approach when it held that a baseball stadium owner was liable under Colorado's Open Records Act because the documents in the owner's possession were used by a public stadium district in the exercise of its official functions.[158] In essence, the records were public because they were "writings made, main-

154. 360 A.2d 123 (N.H. 1976), *superseded by statute as stated in* Voelbel v. Bridgewater, 667 A.2d 1028. 1029 (N.H. 1995). The statute superseding this case does not alter the approach taken by the court in regard to public access to information in the hands of private entities.

155. *See id.*

156. *See id.* at 124-25.

157. *Id.* at 125. A recent Supreme Court of New Hampshire decision also suggests that a "public function" approach is to be used under the state access law. In *Union Leader Corp. v. New Hampshire Housing Finance Authority*, 705 A.2d 725 (N.H. 1997), the court held that a housing finance authority was subject to the state's Right-to-Know law because it was acting as a "public instrumentality" operating to perform "essential government functions." *Id.* at 731. However, the entity in Union Leader was not a purely private entity as it was subject to state control and funding. As a result, it remains somewhat unclear what the court would do if faced with a purely private entity.

158. *See* International Bhd. of Elec. Workers Local 68 v. Denver Metro. Major League Baseball Stadium Dist., 880 P.2d 160, 164 (Colo. Ct. App. 1994).

tained, or kept by the . . . [public] agency . . . for use in the exercise of [its official] functions," regardless of the fact that they were not in the public agency's actual personal custody or control.[159] The private contractor maintained the documents for the Stadium District, and the District used them to select an electrical subcontractor for its public stadium project.[160] In short, the document's contents were the focus, and since they contained public information, regardless of the entity that actually held them, they were subject to public access.

Following an approach similar to Colorado's, one Maine court has followed the nature of records approach. In *Bangor Publishing Co. v. University of Maine System*,[161] the Maine Superior Court ordered a university system to release documents relating to the financial terms of employee settlements because, it held, "public records" must be construed broadly to include more than just records in the actual possession of a public agency.[162] The court ruled that public records also include anything relating to the transaction of public business, regardless of literal possession or the attributes of the entity holding the records.[163] In other words, the *records* were public because they were held for a public entity and related to public business; therefore, the university could not evade the law by placing public documents in private hands.[164]

A court in Minnesota has also held that actual physical possession by a public entity is not required for a record to be considered public under the state's access law, as long as the record has a public purpose. The Minnesota Court of Appeals stated in *Pathmanathan v. St. Cloud University*,[165] that because the government had a contract with the private investigator, all of the documents in his possession were public even though they were not in the university's actual possession.[166] As long as the documents and data were created or main-

159. *Id.* at 164; *see also* COLO. REV. STAT. §§ 24-72-202(2) (1988) (defining "official custodian" as a party responsible for public records, regardless of whether they have actual custody or control).

160. *International Bhd.*, 880 P.2d at 164. The court emphasized that records do not have to be in the actual possession of a public agency in order to be public records, as long as the records are public in nature and used for a public purpose, they are public regardless of the entity that is in actual possession. *See id.* In other words, the records themselves are the primary focus of the Colorado Court of Appeals, rather than the characteristics of the entity or physical possession.

161. 24 Media L. Rep. (BNA) 1792, 1795 (Me. Super. Ct. 1995).

162. *See id.* at 1794-95.

163. *See id.* at 1793-94. The Maine statute defined "public records" as those in actual "possession . . . of [a state] agency . . . or contain[ing] information relating to . . . government business." *See id.* at 1793 (quoting the statute). This provision gave the court the statutory window it needed to apply the "nature of records" approach, as opposed to the more restrictive "possession" approach described in Part III.B.3, *infra*.

164. *See id.* at 1794.

165. 461 N.W.2d 726 (Minn. Ct. App. 1990).

166. *See id.* at 728.

tained for public purposes, they were public regardless of the nature of the entity in possession.[167] In short, the court adopted the flexible approach of allowing public access to records when the records have some government purpose, finding little relevance in the identity of the actual possessor or its characteristics.

In Montana, where a constitutional provision protects the public's right to know,[168] the Montana Supreme Court ruled that a school district was not required to provide records relating to a student's admission to the National Honor Society because the records were not "documents . . . of . . . public bodies" under the right-to-know law.[169] The court focused on the nature of the documents themselves, reasoning that they were produced by an independent private organization with no information regarding school matters or employee issues.[170] They were simply assessment records filed voluntarily by teachers with a private organization outside of the teachers' job requirements.[171] In fact, the school district itself had no records pertaining to the National Honor Society, thus the records had no government purpose.[172] But the court adopted the nature of records approach when it suggested that records relating to a government purpose would be subject to the right-to-know provision in Montana's Constitution.[173]

Finally, Washington and Wisconsin courts of appeals have also adopted a version of the nature of records approach. In Washington, the Court of Appeals held that a private contractor's records filed with city government pursuant to contract were public because they contained information "relating to the . . . performance of a [government] function," the rehabilitation of the city's sewer system, under the Washington Public Disclosure Act.[174] This was true regardless of the characteristics of the entity involved (in contrast to the public function approach described above), or the entity in actual possession. Similarly, the Wisconsin Court of Appeals held that a memorandum of understanding regarding a lawsuit settlement was a pub-

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167. *See id.*

168. *See* MONT. CONST. art. II, § 9.

169. Becky v. Butte-Silver Bow Sch. Dist. No. 1, 906 P.2d 193, 195-96 (Mont. 1995).

170. *See id.* at 197.

171. *See id.*

172. *See id.*

173. *See id.*; *see also* Worden v. Montana Bd. of Pardons and Parole, 962 P.2d 1157 (Mont. 1998) In *Worden*, the Montana Supreme Court held that the term "documents of public bodies" as used in the Montana Constitution and state statutes meant documents related to the function and duties of a public body. Although the court did not have the documents of inmates to determine their subject matter, it nonetheless held the documents to be public because they were maintained and used by a public body. *Id.* at 1162. Thus, presumably the nature of the records would relate to the function of the boards of pardon and parole, both of which are public bodies. *See id.*

174. Laborers Int'l Union Local No. 374 v. City of Aberdeen, 642 P.2d 418, 420 (Wash. Ct. App. 1982).

lic record even though a private attorney prepared the memorandum.[175] Because the memorandum played a significant role in the settlement process, it was presumed open since it was held for a public "authority" under the state public records law.[176] The court focused on the nature of the record by stating that a public entity could not avoid access by delegating the record's creation and custody to an agent.[177] The record would be treated as if it had been retained by the school board itself, with little attention given to the attributes of the entity holding the record.[178]

The three approaches highlighted in this section represent flexible standards taken by twenty-two states in determining whether a private entity will be subject to the various state access laws. These approaches are flexible because they show the willingness of courts to scrutinize an entity or records involved in privatization to determine whether they are public in nature, without rejecting access based on one narrow factor. In contrast to the state court cases discussed in the next section, these courts, which make up the majority, are willing to allow access to the records of a private entity even though certain factors, such as public funding, possession, and control, may not be present.

B. The Restrictive Approaches Limiting Access

The other twelve states that have dealt with the issue of privatization and public access in their court systems have taken a more narrow, or restrictive, approach. These states have focused more on one determinative issue in deciding whether or not a private entity should be subject to freedom of information laws. While these states do not always deny access, they only grant records requests from private entities under limited circumstances, which are usually determined by state statutes. In these states, the courts are usually bound to uphold statutory mandates regarding when a private entity and its records can be considered public. Arguably, it is easier in these states for government agencies to delegate functions to private entities without being subject to freedom of information laws.

1. The "Public Funds" Approach: Arkansas, Michigan, North Dakota, Indiana, South Carolina, and Texas

Six states have allowed access to documents of private entities only if the requisite level of "public funding" is present. For example,

175. *See* Journal/Sentinel, Inc. v. School Bd. of the Sch. Dist., 521 N.W.2d 165 (Wis. Ct. App. 1994).
176. *See id.* at 169-70.
177. *See id.* at 170.
178. *See id.*

the Arkansas Supreme Court has used this public funds approach. In *Sebastian County Chapter of the American Red Cross v. Weatherford*,[179] the court held that a private charitable organization was not subject to the Arkansas Freedom of Information Act because a one-dollar-per-year lease with the City of Fort Smith did not qualify as support by public funds under the Act.[180] The court held that one dollar could not be considered "wholly or partially supported by public funds" under the Act's definition of "public records," because the Arkansas legislature required direct funding to the private entity in order for its records to be subject to the Act.[181] Although the court stated that the Act should be applied "liberally," it essentially took a plain language approach to the statute by refusing to expand the Act's application to entities that receive some sort of public funds "no matter how minor."[182] In other words, the court was restricted to the explicit definition of "public records" under the statute.

The Michigan Court of Appeals has also taken a public funds approach similar to that taken by the Arkansas Supreme Court. In *Kubick v. Child and Family Services*,[183] the Michigan Court of Appeals held that a private, nonprofit foster-care corporation was not subject to the Michigan Freedom of Information Act because it received less than half of its funding from government sources and was not a "public body" under the Act.[184] This court also took a plain language approach, reasoning that the "primarily funded" language meant that the private entity must by chiefly or principally funded by public funds in order for it to be subject to the statute.[185] In short,

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179. 846 S.W.2d 641 (Ark. 1993).

180. *See id.*

181. *Id.* at 643-44.

182. *Id.* at 644; *see also* ARK. CODE ANN. § 25-19-103(1) (Mitchie 1999) (defining "public records"). A previous Arkansas Supreme Court decision had granted access to legal memoranda prepared by outside counsel for the City of Fayetteville, holding that outside counsel hired by the city were essentially acting as city attorneys and documents prepared by them were subject to the Act. *See* City of Fayetteville v. Edmark, 801 S.W.2d 275 (Ark. 1990). The court rejected the public funds argument in *Edmark* because although the outside counsel was not the city's regular attorney, the documents were essentially the city government's in that they pertained directly to the government. *See id.* at 278-79. This decision apparently does not reject the public funds approach, but it instead focuses on the fact that an attorney's files belong to the government and thus are not the property of any private entity. *See id.* at 279. Thus, it is not the agency's "support by public funds" that is even relevant in such a case.

183. 429 N.W.2d 881 (Mich. Ct. App. 1988).

184. *See id.*

185. *Id.* at 883. The court declined, however, to state exactly how much funding would constitute "primarily funded" through government funds. *Id.* In an earlier decision, the Court of Appeals also favored the "actual possession" approach, discussed *supra*. In *Hoffman v. Bay City Sch. Dist.*, 357 N.W.2d 686 (Mich. Ct. App. 1984), the court held that because the document in question was produced and maintained by a private entity, it was not in possession of the government and was not a "public record" under the Act. *Id.* at 688-89. The court refused to hold that the school district was in "constructive possession" of its attorney's investigative records, putting it in direct conflict with those state courts that

without some unspecified level of public funding, a private entity in Michigan will not be subject to the state's Freedom of Information Act because of its explicit definition, regardless of other factors such as the function of entity or control.

The North Dakota Supreme Court has used an approach that renders a private entity subject to access if it is "supported" by government under the statutory language. In a recent case, the court stressed that this support by government must be more than mere bargained-for consideration or a *quid pro quo* between the government and private agency.[186] The court did not consider an exchange of goods for services to be support by the government and therefore refused to grant access to the documents of Greater North Dakota Association, which was essentially an arm of the chamber of commerce involved in lobbying and business promotional activities.[187]

Similarly, in *Indianapolis Convention & Visitors Association v. Indianapolis Newspapers, Inc.*,[188] the association at issue was a "public agency" under Indiana's Access to Public Records Act only because it was "maintained and supported" in whole or part by public funds from Marion County.[189] The association did not have a "fee-for-services" arrangement with the county because it was actually supported through yearly taxation, county property and equipment without cost.[190] Without this obligation for yearly county support, the association would not have been a public agency under the access

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would take a more flexible approach to what constitutes a "public record." *Id.* at 689. *See* also Part III.A, *supra.*

The Michigan Court of Appeals followed the *Kubick* approach in the recent decision of *State Defender Union Employees v. Legal Aid and Defender Ass'n of Detroit*, 584 N.W.2d 359 (Mich. Ct. App. 1998), when it had to decide as an issue of first impression whether an organization that received payment from government sources to provide legal services to Detroit residents was "primarily funded by or through state or local authority" under the statute. *Id.* at 360. The court used the plain meaning of the term "funded" to determine that the organization was not a public agency because it merely provided services in exchange for a fee. *See id.* at 362. The court refused to make every entity doing most of its business with the government a "public body" under the statute. *See id.*

186. *See* Adams County Record v. Greater N. Dakota Ass'n, 529 N.W.2d 830, 835 (N.D. 1995).

187. *See id.* The Supreme Court held that summary judgment was inappropriate as there were "genuine issues of material fact as to whether GNDA is an organization supported in part by public funds, and thus subject to the open records law." *Id.* at 831. In fact, GNDA was meant to be the "voice of business . . . in North Dakota," and it included 10 government agencies as members, solicited government members, and was given state funds for certain activities. *Id.* at 832. However, these wound up being funds for services, as opposed to financial support from the government. The court refused to read the support provision expansively, opting to focus only on public funding to determine whether a private entity is subject to the disclosure law. *See id.*

188. 577 N.E.2d 208 (Ind. 1991).

189. *Id.* at 209; *see also* IND. CODE ANN. § 5-11-1-16(e) (West 1989) (defining public agency).

190. *Indianapolis Newspapers*, 577 N.E.2d at 212-13.

law.[191] Again, the court had a specific, explicit definition of what constitutes a "public agency" from the Indiana legislature, limiting the court's discretion.

South Carolina's access law contained language similar to the Indiana law when the South Carolina Supreme Court held in *Weston v. Carolina Research & Development Foundation*[192] that a research and development foundation was subject to the state's Freedom of Information Act because it was "supported in whole or in part by public funds or expending public funds."[193] The foundation had received public funds in connection with the sale of public real estate, utilized university personnel and a federal grant, directed the expenditure of public funds, and retained research monies from university employees.[194] Thus, it had the requisite level of funding to bring it within the access law's specific mandate.[195] This was because "the only way that the public can determine with specificity how those funds were spent is through access to the records and affairs of the organization receiving and spending the funds."[196] However, the opinion makes clear that only support by public funds will subject a private entity to the state's freedom of information law because of the statute's explicit language.

Lastly, two Texas courts have used the public funds approach. The Texas Court of Appeals in Dallas has held that public funds are needed to subject a private entity to the Texas Open Records Act, and that private schools do not receive the requisite support from public funds.[197] Instead, private schools receive private monies, therefore they are not subject to the Act since they are not "supported in whole or in part by public funds or expend[] public funds."[198] In a recent decision, the Texas Court of Appeals in Waco held in *Blankenship v. Brazos Higher Education Authority, Inc.*[199] that a higher education authority was not a "governmental body" because it received no funding from a state governmental entity, but that it was instead privately engaged in issuing revenue bonds to purchase student loans.[200]

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191. *See id.* at 214.

192. 401 S.E.2d 161 (S.C. 1991).

193. *Id.* at 163; *see also* S.C. CODE ANN. § 30-4-20(a) (Supp. 1989) (defining public record).

194. *See Weston*, 401 S.E.2d at 163-64.

195. In fact, the *Weston* court stated that the receipt of any public funds would bring an entity within the state access law. *See id.* at 164. Thus, its public funds approach was somewhat broader than the other states that required a requisite level of funds.

196. *Id.* at 165.

197. *See* A.H. Belo Corp. v. Southern Methodist Univ., 734 S.W.2d 720, 723 (Tex. App. 1987).

198. *Id.* at 723; *see also* TEX. GOV'T CODE ANN. § 3 (West 1994 & Supp. 2000) (defining "governmental body").

199. 975 S.W.2d 353 (Tex. App. 1998).

200. *Id.* at 363-64.

Because the two courts had a clear statutory mandate, they were only concerned with the necessary public funds in determining whether the private entity should be subject to public access. Like the other five states stressing funding, the Texas courts were only concerned with the necessary public funds in determining whether the private entity should be subject to public access because it had a clear statutory mandate.[201]

2. The "Prior Legal Determination" Approach: Pennsylvania, Tennessee, New Jersey, and West Virginia

Four states use a restrictive approach limiting access to cases where the private entity was created by the legislature or in some way previously determined by law to be subject to freedom of information laws.[202] For example, the Pennsylvania Supreme Court held in *Community College v. Brown*,[203] that a community college was not an agency within the meaning of the state's Right to Know Act because it was not created by statute or pursuant to a statute making the college's activities an essential government function.[204] The court held that the community college must perform an essential government function as defined by statute or constitutional mandate, or it must perform a function vital to the continued existence of the state.[205] The functions of community colleges were not "essential" because they were not mandated by statute or the constitution, and the state would not be put in jeopardy in absence of community colleges.[206] In short, there had been no previous legal determination

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201. At least one commentator has nonetheless feared that Texas private entities are still "susceptible" to the Texas Open Records Act. *See generally* Byron C. Keeling, *Attempting to Keep the Tablets Undisclosed: Susceptibility of Private Entities to the Texas Open Records Act*, 41 BAYLOR L. REV. 203 (1989). The author suggests that the Act was absolutely not meant to reach private entities, but has nonetheless been construed to reach private entities by attorneys general in that state, and that any amount of public funding will subject the private entity to the Act. *See id.* at 215. Nonetheless, this Article suggests that the Texas approach would actually be more protective of private entities and less favorable to access than the approach taken by many other states.

202. This section includes cases where the law had previously determined that a certain entity should be subject to the access laws. This includes cases where a legislative determination makes the entity public, or where the state constitution labels the entity or the entity's function as subject to public access. Like the other "restrictive" approaches, it can be said that this approach limits judicial discretion because there already has been a previous mandate subjecting the entity to access.

203. 674 A.2d 670, 671 (Pa. 1996).

204. *See id.* at 671; *see also* 65 PA. CONS. STAT. § 66.1(1) (1996).

205. *See Community College*, 674 A.2d at 671. The "vital function" language suggests a function that is constitutionally guaranteed or essential for survival, thus it really adds no flexibility to the legislative determination approach. *See id.* at 672 n.4 (discussing dictionary definition of the word "essential" as something indispensable or fundamental).

206. *Id.* at 671-72.

that community colleges should be subject to public access, particularly from the state legislature or constitution.[207]

The Tennessee Court of Appeals has also held that a private entity is not subject to the Public Records Act unless it is previously determined to be open by legislative determination or other law. In *Memphis Publishing Co. v. Shelby County Health Care Corp.*,[208] the court held that a hospital operated by a not-for-profit corporation was a private hospital rather than a governmental entity because the corporation did not originate in the General Assembly, but was instead incorporated as a private corporation.[209] The corporation operated in a similar fashion to any other private corporation, even though it was arguably being operated for a public purpose.[210] In other words, neither legislative determination nor another law had operated to transform the hospital into a public entity, regardless of the corporation's functions.[211]

New Jersey and West Virginia courts have also developed a form of the prior legal determination approach. In *Keddie v. Rutgers State University*,[212] the New Jersey Supreme Court held that legal documents in the possession of Rutgers University were not "public records" under the state's Right-to-Know Law because they were not "explicitly required 'to be made, maintained or kept on file' by Rutgers."[213] New Jersey law did not require the documents to be kept on file to satisfy auditors; thus, they were not "right-to-know" docu-

207. *See id.*; *see also* Mooney v. Bd. of Trustees, 292 A.2d 395 (Pa. 1972). *Mooney* held that the legislature did not alter the status of a private university (Temple) by increasing state funding. *See id.* at 400-01. The university was not a state "agency" under the Inspection and Copying Records Act because it did not meet the statutory requirement of being "a State or municipal authority or similar organization." *Id.* at 398. The state had declared that Temple would remain a nonprofit corporation chartered for educational purposes and not a state agency. *See id.* at 400. Thus, there had been a legal determination that the university was private. *Cf.* Sapp Roofing Co. v. Sheet Metal Workers' Int'l Ass'n Local 12, 713 A.2d 627 (Pa. 1998). The Pennsylvania Supreme Court held that a union could access wage information on a government contractor's employees under the Right to Know Act because the records directly related to the expenditure of public funds to pay private employees, and they were part of the school district's decision-making function. *See id.* at 629. Most importantly, they were required to be kept by the contractor under a specific statute, the Prevailing Wage Act. *See id.* at 630. Therefore, the union was empowered to access the records by a specific statute.

208. 799 S.W.2d 225 (Tenn. Ct. App. 1990).

209. *See id.* at 229.

210. *See id.* at 229-30.

211. Additionally, the corporation was not immune from tort liability, and it was not controlled by the state or formally delegated functions of the government. *See id.* at 229. *But see* Creative Restaurants, Inc. v. City of Memphis, 795 S.W.2d 672, 678-79 (Tenn. Ct. App. 1990) (holding that subleases in the possession of a city attorney were "public records" because they were records of the city's leasing agent under contract, creating a legal principal-and-agent relationship between the city and the private entity). The fact that the documents were in the city attorney's hands was irrelevant in *Creative Restaurants* because the attorney was also the city's agent. *See id.*

212. 689 A.2d 702 (N.J. 1997).

213. *Id.* at 704 (quoting N.J. STAT. ANN. § 47-1A-2 (1997)).

ments.[214] Lastly, the Supreme Court of Appeals of West Virginia held in *Four-H Road Community Association v. West Virginia University Foundation, Inc.*[215] that a private nonprofit corporation formed under general corporation law for assisting university fund raising was not subject to disclosure under the Freedom of Information Act because it was neither created nor funded by a state authority.[216] There was no legislative mandate for the entity's creation. As a result, it was the same as any other corporation in the state.[217] Like the other three states, there was no legal determination that the private entity was subject to access; and therefore, judicial discretion was limited.

3. The "Possession" Approach: Iowa

The Iowa Supreme Court has taken an approach limiting access to documents in public entity possession. In *City of Dubuque v. Dubuque Racing Association*,[218] the court held that a private nonprofit racing association was not subject to access, even though the city participated on the association's board of directors.[219] The documents were neither produced nor originated by the government, nor were they "held by public officers in their official capacity."[220] The court, therefore, took an official capacity approach mandated by the access statute, limiting public access to those cases where the documents are in the "lawful possession" of the public entity.[221] Simply because city officials participated on the racing association's board did not turn the association's business into government business. Accordingly, the documents were not held by the board officials in their official capacity.[222] In short, no official business was involved and the meeting minutes were not held by public officials under the statutory mandate.[223]

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214. *Id.* at 708. However, the court held that the documents were public under common law because they were publicly created, and because Rutgers asserted no claim of confidentiality and could not outweigh the individual's interest in disclosure. *See id.* at 709-711.

215. 388 S.E.2d 308 (W. Va. 1989).

216. *See id.* at 312-13. The statute at issue in this case defined "public body" as an entity created or primarily funded by the government. *See* W. VA. CODE § 29B-1-2(3) (1997). However, the court in this case seemed to focus on the "created by state authority" issue, bringing it within the legal determination line of cases. *Four-H Road Community Ass'n*, 388 S.E.2d at 310.

217. *See Four-H Road Community Ass'n*, 388 S.E.2d at 311-12.

218. 420 N.W.2d 450 (Iowa 1988).

219. *See id.* at 453.

220. *Id.* at 452.

221. *See id.*

222. *See id.* at 452-53.

223. *See id.*; *see also* KMEG Television, Inc. v. Iowa State Bd. of Regents, 440 N.W.2d 382, 385 (Iowa 1989) (holding that the plain meaning of the statute meant that records not shared with the university were not "public records" because the records had nothing to do with public officials acting in their official capacity). The Iowa approach differs from the flexible approach that relies on the nature of records described in Part III.A.3 *supra* be-

4. The "Public Control" Approach: Illinois

The fourth restrictive approach, used by an Illinois appellate court, limits access to cases in which the private entity is effectively controlled by a public agency. In *Hopf v. Topcorp, Inc.*,[224] an Illinois appellate court held that two corporations were not sufficiently controlled by the City of Evanston to render them liable under the state Freedom of Information Act.[225] The two private corporations, created and hired to develop a research park for the city and Northwestern University, were not "subsidiary bodies" of the government under the statutory language and were not "public bodies" under the Act.[226] The City and Northwestern owned shares in the corporations, were entitled to appoint members to their respective boards, and had contributed funds for the research park development.[227] Additionally, the city's involvement in the project had previously been the subject of public debate.[228] However, because the two corporations functioned independently of direct government control, they were not public bodies under the Act.[229] Instead, because the city was unable to control the decision-making process of the corporations (even with board representation and fifty-percent public funding), the corporations were not under the direct public control that the statute required in order to make them subject to access.[230] The court thus focused on one factor in denying access, an approach that can be classified as restrictive and is determined at least somewhat by legislative definitions.

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cause Iowa seems to require some sort of physical possession of the records under the statute, regardless of the subject matter of the records. *See id.* at 385. However, the nature of the records could still be important in Iowa, because the court seems to suggest that if government business is substantially intertwined with the private entity, the records will be in the lawful possession of the government. *See id.* This could probably be termed a kind of constructive possession. The Iowa approach is placed in its own restrictive category because it seems to require some physical or constructive possession under the statute, whereas the flexible courts are not as statutorily restricted and simply require government subject matter.

224. 628 N.E.2d 311 (Ill. App. Ct. 1993).

225. *See id.* at 317.

226. *Id.* at 313, 317.

227. *See id.* at 316-17.

228. *See id.* at 314.

229. *See id.* at 317.

230. It should be noted that the court mentioned three factors to be used in determining whether a private entity is subject to the Freedom of Information Act: independent existence, the nature of the functions performed by the private entity, and the degree of government control. *See id.* at 314-15. However, the court still followed a public control approach because it ignored the fact that 50% of the corporations' funds came from the public. *See id.* This public control approach diverges from the traditional totality of factors approach.

C. A Comparison of the Approaches

The seven approaches taken by the thirty-four states analyzed in this Article vary in terms of the relative ease of gaining access to private entities' records. The approaches are classified under the broad headings "flexible" and "restrictive," but the state courts under each sub-category differ in the scope of their inquiry when compared to the states in other sub-categories. For example, it can be argued that the ten states classified under the public function approach are more flexible than the six states falling into the totality of factors category. This is because while the public function courts look only at the nature of the private entity's function, the totality of factors courts require the presence of a variety of factors in order to subject a private entity to freedom of information laws, and one factor alone is not determinative.[231] The public function states, therefore, conduct a broader inquiry instead of a fact-based analysis.

Similarly, some state courts in the restrictive categories are more restrictive than others because they are more constrained by explicit statutory language, such as the requirement of a requisite level of public funding. Other state courts can interpret the determinative factor more broadly, such as what constitutes public control.

Arguably, the nature of records approach described in Part III.A.3 is the most flexible approach used by all states discussed herein because it does not require any enumerated factors for access. This approach makes it almost inevitable that a private entity's documents will be accessible by the public, provided the documents relate to the government in some way and regardless of other factors. Courts using the nature of records approach focus on the documents themselves instead of the entity. If the documents have relevance to government, they should be accessible to the public because they allow the public to discover what its government is doing.[232]

The nature of records courts do more than just give "lip service" to the notion that governments should not be able to violate the purpose behind freedom of information laws by contracting out to private entities.[233] The six states using the nature of records approach—Colorado, Maine, Minnesota, Montana, Washington and Wisconsin—are thus the only states that truly allow access to records because they disclose government actions. The issue is not about privatization or the nature of the entities involved when one is seeking access in these states. Instead, the issue becomes one of the most crucial

231. For example, compare the totality of factors approach in Florida, *supra* Part III.A.1, with Georgia's public function approach, *supra* Part III.A.2.

232. *See supra* Part III.A.3.

233. *See supra* note 151 and accompanying text.

reasons for freedom of information: the public's right to know what its government is doing.

Unless courts recognize that public documents belong to the public, regardless of who physically possesses them, they are violating one of the essential "spirits" of access laws. For example, documents regarding a government settlement should be public even if some private entity possesses them. If a majority of courts viewed the privatization issue from a nature of records perspective, there would be no need to fear the growing privatization movement from a public access standpoint because of the courts' broad analysis regarding what constitutes a public record.

The restrictive approaches limit access because, under these approaches, state courts look to only one factor to determine whether a private entity should be subject to public access. Among the four restrictive approaches, the prior legal determination and possession approaches probably have the most potential for circumventing freedom of information through privatization. When courts require public entities to actually possess the documents, or require a prior legal determination granting access, the courts essentially allow governments to use privatization to circumvent the public's right to know. Governments in these restrictive states can contract their services to private entities that will then have little access responsibility unless the government retains possession of the documents or the law essentially requires access.[234] In privatization contexts where the government intends to circumvent access, it is hard to imagine that either possession or the law would protect the public's right to know.

The prior legal determination and possession approaches are therefore even more restrictive than either the public funds or public control approaches because they rely more heavily on specific, explicit statutory provisions. Conversely, under either the public funds or the public control approach, at least some courts seem willing to allow access in a variety of cases, interpreting the statutory mandates fairly broadly under some circumstances. For example, some courts may allow access to a private entity if it is given *any* public funds or if it is subjected to marginal public control.[235] While these approaches are restrictive, as they tend to limit access to cases where a specific factor is present, it can be argued that in many privatiza-

234. *See supra* Part III.B.2-3.

235. *See supra* Part III.B.1, -B.4. Arguably, Illinois' approach (described in Part III.B.4) is restrictive because it ignores the public entity's involvement in the private corporation. However, as the *Hopf* court suggested, if the city exhibited some sort of decision-making or other authority that rendered the corporations' existence dependent on the government, the corporations would have been subject to the Freedom of Information Act. In short, the public control approach could be less restrictive than other approaches as long as some degree of requisite control is present, a situation that may not be very uncommon in privatization situations.

tion cases, at least some degree of public funds or control will be involved. If courts are willing to allow access based on the minimal presence of these factors, then the public funds and public control approaches may be less harmful to access than the approaches that require a particular legal mandate or possession. Only in cases of complete privatization, which are fairly rare,[236] would the government be able to escape access requirements by completely turning over its operations to a private entity. Contracting out is the more common form of privatization;[237] thus, these two approaches may pose less of a threat to the public's right to know than it would initially seem.

In short, one can envisage a scale of approaches based on the degree of public access to private entity records, from most favorable to least favorable. This scale, with "1" being the most favorable to public access and "7" being the least favorable, would give the practitioner and public an idea of which states are most likely to grant access in the face of privatization, and which states are likely to allow the government to privatize with little resulting responsibility on the part of private entities to provide access to records:[238]

1. The *nature of records* approach (six states)—allowing access as long as the records pertain to some aspect of government;

2. The *public function* approach (ten states)—allowing access when the private entity is performing a government function;

3. The *totality of factors* approach (six states)—allowing access as long as the presence of certain factors outweighs the absence of other factors (such as public funding, control, independence, etc.);

4. The *public funds* approach (six states)—limiting access to those cases where the requisite level of public funding is present;

5. The *public control* approach (one state)—limiting access to those cases where the requisite level of government control is present;

6. The *possession* approach (one state)—limiting access to those cases where the public entity is in possession of the documents;

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236. See *supra* Part II for a description of the various forms of privatization.

237. *See id.*

238. Again, note that only thirty-four states have dealt with the issue of privatization and public access to private entities. Therefore, sixteen states have yet to adopt one of the approaches described in this Article; indeed, those sixteen states could invent their own approaches. *See supra* note 11 and accompanying text.

7. The *prior legal determination* approach (four states)—limiting access to those cases where there has been a legal determination that the entity should be subject to access (i.e., statutory or constitutional).

This scale assists in determining where in the United States privatization most drastically impacts public access. By categorizing the thirty-four states that have reached the privatization issue, it is possible for the media lawyer, the practicing media professional, and the public to better understand how contracting out can effectively close the door on access, and in what parts of the country that door is locked the tightest.

IV. CONCLUSION

The purpose of this Article is to provide a useful categorization for determining where in the United States privatization is having the most dramatic impact on public access, as well as to determine which states are most likely to uphold the public's right to know in the face of privatization. Privatization has been a continuing trend since the 1980s. Each year, privatization affects many services traditionally performed in the open, from fire protection to university operations. Until fairly recently, however, the access to government information issue had not taken center stage in the privatization debate. An essential goal of this Article is to highlight the effects privatization actually has on access to information that was once public.

Although all fifty states have statutes protecting the public's right to know, many state courts must determine the reach of these statutes with respect to private entities because state legislatures have failed to amend their laws in the face of privatization. In many states, statutory definitions explicitly determine when an entity and its records are public, but in other states the courts have some discretion to interpret the statutes in a flexible or restrictive manner. This is because when most states drafted statutes to protect the public's right of access to *public* information, the respective legislatures may not have contemplated the growing privatization trend. It is now up to the courts, in the absence of legislative action, to contemplate this trend and protect the spirit of openness. This Article is meant to provide information regarding how the state courts are dealing with this growing phenomenon as of early 1999. Vigorous public and legal debate over the effect of privatization should continue, lest the freedom of information laws develop huge loopholes for governments to jump through in this new millennium.